

**IN THE UNITED STATE DISTRICT COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION**

FEDERATED MUTUAL INSURANCE  
COMPANY as subrogee of BELLMAN  
OIL CO., INC. and B & B TRANSPORT  
INC.,  
PO Box 486, Owatonna, MN 55060,

Plaintiff,

vs.

CASE NO.: 3:20-cv-00960

KOSCIUSKO COUNTY, INDIANA,  
100 W Center St., Warsaw, IN 46580,

And

KOSCIUSKO COUNTY HIGHWAY  
DEPARTMENT,  
2936 E Old Road 30, Warsaw, IN 46582,

And

PHEND & BROWN, INC.,  
367 E. 1250 N., PO Box 150, Milford, IN  
46542,

Defendants.

**BRIEF IN SUPPORT OF FEDERATED MUTUAL INSURANCE COMPANY'S  
MOTION TO STRIKE PHEND & BROWN, INC.'S COUNTERCLAIM  
WITHIN ITS AMENDED ANSWER**

Plaintiff, Federated Mutual Insurance Company ("Federated Mutual"), by and through undersigned counsel and pursuant to Fed. R. Civ. P. 12(f) and Fed. R. Civ. P. 13, states the following for its Brief in Support of Motion to Strike Phend & Brown, Inc.'s Counterclaim within its Amended Answer against Bellman Oil Co., Inc. and B & B Transport, Inc.:

1. On November 13, 2020, Federated Mutual, as insurer and subrogee of Bellman Oil Co., Inc. and B & B Transport, Inc., filed this action against the Defendants, including Phend &

Brown, Inc., related to construction services performed by Phend & Brown, Inc. on a portion of roadway in Kosciusko County, Indiana. Federated Mutual's *Complaint* [Doc. No. 1] is attached hereto as **Exhibit A**.

2. On January 7, 2021, Phend & Brown, Inc. filed its Answer and Affirmative Defenses to Federated Mutual's *Complaint* [Doc. No. 21]. On January 20, 2021, Phend & Brown, Inc. filed an Amended Answer<sup>1</sup> to Plaintiff's *Complaint* and asserted a purported Counterclaim against Bellman Oil Co., Inc. and B & B Transport, Inc. *Phend & Brown, Inc.'s Amended Answer to Plaintiff's Complaint and Counterclaim* [Doc. No. 26] is attached hereto as **Exhibit B**.

3. Federal Rule of Civil Procedure 12(f) states in relevant part: "[t]he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f)(2) then adds that the Court may act "on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading."

4. Federated Mutual has not filed a responsive pleading to the Counterclaim asserted in the Amended Complaint and less than 21 days have passed since Federated Mutual was served with the Counterclaim asserted in the Amended Complaint.

**A. The Court Should Strike Defendant Phend & Brown, Inc.'s Purported Counterclaim.**

5. In its Answer, Defendant Phend & Brown, Inc. asserts a purported Counterclaim naming only Bellman Oil Co., Inc. and B & B Transport, Inc. as purported Counterclaim Defendants. No claims were asserted against the sole Plaintiff, Federated Mutual, in the Counterclaim.

---

<sup>1</sup> N.D. Ind. L.R. 10-1(a) indicates that "[r]esponsive pleadings under Fed. R. Civ. P. 7(a) must: (1) restate verbatim the paragraphs from the pleading they respond to; and (2) immediately following each restated paragraph, state the response to that paragraph." Neither Phend & Brown, Inc.'s initial Answer nor its Amended Answer restate verbatim the paragraphs from the pleading they respond to, and thus do not comply with N.D. Ind. L.R. 10-1(a).

6. Federal Rule of Civil Procedure 13(a)(1) provides that counterclaims may be made against “an opposing party.” Federated Mutual’s *Complaint* did not name either Bellman Oil Co., Inc. or B & B Transport, Inc. as Plaintiffs (*i.e.* as “an opposing party”).

7. As such, Phend & Brown, Inc.’s Counterclaim asserted within its Amended Answer violates Fed. R. Civ. P. 13 and should be stricken because it is not asserted against an opposing party.

8. Moreover, Phend & Brown, Inc.’s purported Counterclaim violates Federal Rule of Civil Procedure 8(a)(1), requiring “a short and plain statement of the grounds for the court’s jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support,” because it contains no allegations pertaining to subject matter jurisdiction to support the addition of two new parties to this action.

**WHEREFORE**, Federated Mutual respectfully requests that the Court strike Defendant Phend & Brown, Inc.’s Counterclaim asserted in its Amended Answer against Bellman Oil Co., Inc. and B & B Transport, Inc., and award such further relief as the Court deems just.

Dated February 10, 2021.

Respectfully submitted,

/s/ Daniel J. Curtin

Danny Merrill Newman Jr. (#33668-15)

Daniel J. Curtin (#35814-45)

**Reminger Co., L.P.A.**

One Professional Center, Suite 202

2100 N. Main Street

Crown Point, Indiana 46307

T: 219-663-3011

F: 219-663-1049

[dnewman@reminger.com](mailto:dnewman@reminger.com)

[dcurtin@reminger.com](mailto:dcurtin@reminger.com)

*Counsel for Plaintiff, Federated*

*Mutual Insurance Company*

**CERTIFICATE OF SERVICE**

I certify the on February 10, 2021, a true and complete copy of the above and foregoing was served in accordance with Fed. R. Civ. P. 5, pursuant to the district court's ECF system as the ECF filers, and was served by regular mail to non-ECF filers and parties who do not appear to be registered with the Court's ECF system.

Thomas R. Schultz, Esq.  
Jon L. Bucher, Esq.  
Schultz & Pogue, LLP  
520 Indiana Avenue  
Indianapolis, IN 46202  
[tschultz@schultzpoguelaw.com](mailto:tschultz@schultzpoguelaw.com)  
[jbucher@schultzpoguelaw.com](mailto:jbucher@schultzpoguelaw.com)  
*Counsel for Phend & Brown, Inc.*

James S. Stephenson, Esq.  
Joseph Hendel, Esq.  
Stephenson Morow & Semler  
3077 East 98<sup>th</sup> Street, Suite 240  
Indianapolis, IN 46280  
[jstephenson@stephlaw.com](mailto:jstephenson@stephlaw.com)  
[jhendel@stephlaw.com](mailto:jhendel@stephlaw.com)  
*Counsel for Kosciusko County, Indiana and  
Kosciusko County Highway Department*

/s/ Daniel J. Curtin  
Daniel J. Curtin (#35814-45)  
**REMINER CO., L.P.A.**